Supreme Court, U.S.
FILED
NOV 13 2000
CLERK

(3)

No. 00-258

In The

Supreme Court of the United States

ANTHONY FLETCHER,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition For Writ Of Certiorari To The Pennsylvania Supreme Court

REPLY BRIEF

JEROME J. SHESTACK*
JARETT B. DECKER
ALIZA R. KARETNICK
WOLF, BLOCK, SCHORR & SOLIS-COHEN LLP
1650 Arch Street, 22nd Floor
Philadelphia, PA 19103-2097
(215) 977-2000

Counsel for Petitioner, Anthony Fletcher

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

9pp

INTRODUCTION

Petitioner Anthony Fletcher seeks review on certiorari of constitutional issues that were actually adjudicated and decided by the Pennsylvania Supreme Court, including: (1) whether the trial court violated Fletcher's right to testify and to present a defense at the capital-sentencing hearing by forbidding him from testifying that the killing was not drug-related, when drug-related motivation was one of the two aggravating factors used to obtain the death sentence; and (2) whether the trial court violated Fletcher's Sixth Amendment right to confront adverse witnesses by admitting the decedent's alleged out-of-court statement suggesting that the motive for the killing was drug-related without any indicia of the statement's reliability. In his brief to the Pennsylvania Supreme Court, Fletcher specifically challenged those trial-court errors and cited authority grounded in his constitutional rights to present mitigating evidence and to confront adverse witnesses.

Those issues are properly before this Court. The Commonwealth of Pennsylvania argues that Petitioner waived his right to bring his claims before this Court because he did not separately enumerate the constitutional grounds in his brief to the Pennsylvania Supreme Court. The cases that Fletcher cited in his brief to the Pennsylvania Supreme Court, however, cite and rely on United States constitutional precedents, and therefore properly raised the constitutional issues. The Commonwealth's claims of waiver have no merit.

Moreover, the Commonwealth inaccurately portrays the trial judge's rulings below in an effort to obscure the real impact they had on Fletcher's ability to challenge the aggrevating circumstances that supported his death sentence. Forbidden from "presenting evidence regarding his claim that this shooting occurred due to a gambling debt," as the trial judge himself put it, Fletcher was unable to challenge the prosecutor's claim during the

sentencing hearing that the confrontation with the decedent was drug-related. This Court should therefore grant certiorari for the reasons stated in Fletcher's Petition.

I. FLETCHER PROPERLY RAISED A CONSTITUTIONAL CHALLENGE TO IMPROPER RESTRICTIONS ON HIS TESTIMONY BELOW

During the capital-sentencing phase, Petitioner was precluded from presenting testimony that the shooting of the decedent was not drug-related. In his brief to the Pennsylvania Supreme Court, Petitioner challenged the trial court's order *in limine* preventing him from presenting such testimony. Appendix at 70a. In his argument, Fletcher cited this Court's decision in *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S. Ct. 1078, 108 L.Ed. 2d 255 (1990), for the proposition that jurors must be given access to "any mitigating evidence presented by the defense in the death penalty phase." This Court's ruling in *Blystone*, of course, relies on federal constitutional law. Because Fletcher preserved his challenge to the trial judge's order *in limine* on constitutional grounds, the issue is now properly before this Court.

The Commonwealth claims that the issue is waived because Fletcher supposedly did not object at trial to the restrictions on his testimony. No such claim of waiver was raised below. More importantly, the Pennsylvania Supreme Court actually adjudicated and decided the constitutional issue raised by Fletcher on its merits. See Appendix at 25a (attached to Petition). Therefore, the waiver claim cannot be raised here. *Orr v. Orr*, 440 U.S. 268, 274, 99 S.Ct. 1102, 1109, 59 L.Ed. 2d 306 (1979).[1]

---

[1] Furthermore, the waiver claim makes no sense, because the challenged ruling was an order *in limine* opposed by the defense at trial; the defense's opposition and challenge to the ruling in a post-trial motion is the equivalent of objection.

To blunt the impact of the denial of Petitioner's right to present mitigating evidence, the Commonwealth mischaracterizes the scope of the order *in limine* that muzzled Fletcher in his testimony at the sentencing hearing. The Commonwealth claims that "Petitioner was entitled to testify to the applicability of aggravating and mitigating circumstances, including the circumstances of the offense. The Court did not prevent him from doing so; he was free to admit the murder but claim it arose from a non-drug motivation." Resp. Brief at p. 10. But the Commonwealth's gloss is at odds with the Court's actual ruling.

The breadth of the trial judge's order *in limine* is clear: In its May 17, 1993 Opinion, the Court ruled that it did not err in "forbidding the defendant from presenting evidence regarding his claim that this shooting occurred due to a gambling debt." Appendix at 66a (attached to Petition).[2] Denied an opportunity to testify that the shooting resulted from other circumstances, Fletcher was unable to dispute the prosecutor's contention that the shooting was drug-related. In its brief to this Court, the Commonwealth makes no mention of the trial judge's own characterization of the scope of his order and tries to recast the record so that the order *in limine* does not appear as restrictive as it actually was.

In forbidding Fletcher from testifying that his altercation with the decedent was not drug-related, the trial court prevented him from rebutting one of the two aggravating factors used to obtain the death sentence. Absent

---

[2] Defense counsel was also required to explain the trial court's order *in limine* to his client on the record, and explained that Fletcher would not be able to testify as to the circumstances of the offense. The Commonwealth attempts to argue that the trial court somehow contradicted or "corrected" counsel's explanation of its order, but the comments of the trial court cited by the Commonwealth say nothing of the kind. Resp. Brief at pp. 7-8.

that aggravating factor, Petitioner's death sentence cannot stand. Therefore, the constitutional error committed by the trial judge warrants this Court's review.

II. FLETCHER PROPERLY RAISED THE CLAIM UNDER THE CONFRONTATION CLAUSE BELOW

Fletcher argued to the Pennsylvania Supreme Court that his rights were violated when the trial court admitted an alleged out-of-court statement of the decedent suggesting that Fletcher had a motive to kill him because the decedent had ingested cocaine belonging to Fletcher instead of selling it and giving the proceeds to Fletcher.[3] Second Appendix at 1a. In challenging the trial court's ruling, Fletcher cited *Commonwealth v. Tann*, 459 A.2d 322, 327 (Pa. 1983). Second Appendix at 2a. *Tann*, in turn, relies on *Commonwealth v. DuVal*, 307 A.2d 229, 232 (Pa. 1973), which invokes a long line of authority from this Court interpreting the Confrontation Clause. Among the authorities cited by *DuVal* are *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965); *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed. 2d 934 (1965); and *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968). The Court in *DuVal* explained that "the Sixth Amendment right to confront witnesses, made applicable to the states by the Fourteenth Amendment, . . . [is] violated by procedures which

---

[3] The Commonwealth points out that the issue was raised through a claim that counsel rendered ineffective assistance by failing to object to the evidence. The Pennsylvania Supreme Court, however, adjudicated the issue based on the merits of admitting the evidence, so the merits of the issue are properly before this Court. *Orr v. Orr*, 440 U.S. 268, 274, 99 S.Ct. 1102, 1109, 59 L.Ed. 2d 306 (1979).

permit [ ] the jury to learn the substances of uncrossexamined, extrajudicial statements of alleged co-felons." *Id.* at 232.

The issues raised and preserved by Fletcher's reference to *Tann* and, derivatively, to *DuVal* are precisely the same constitutional issues that Fletcher now raises in his petition to this Court. The Commonwealth's assertion that Fletcher waived those issues is therefore baseless.

Furthermore, the Commonwealth's suggestion that Fletcher's claim is based on law "handed down years after the supposed ineffectiveness took place" (citing *Lilly v. Virginia*, 527 U.S. 116 (1999)) is inaccurate. Resp. Brief at p. 12. Fletcher's Petition relies on well-established Confrontation Clause principles that have been firmly ensconced in this Court's jurisprudence since at least *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed. 2d 638 (1990). *See*, Petition at pp. 15, 19. As for the merits of the Confrontation Clause claim, Fletcher stands on his Petition.

JEROME J. SHESTACK*
JARETT B. DECKER
ALIZA R. KARETNICK
WOLF, BLOCK, SCHORR & SOLIS-COHEN LLP
1650 Arch Street, 22nd Floor
Philadelphia, PA 19103-2097
(215) 977-2000

Counsel for Petitioner, Anthony Fletcher

**Counsel of Record*

SECOND APPENDIX

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

NO. 0141 CAPITAL APPEAL DOCKET

COMMONWEALTH OF PENNSYLVANIA
APPELLEE

VS.

ANTHONY FLETCHER
APPELLANT

ON APPEAL FROM THE JUDGMENT OF SENTENCE OF COURT OF COMMON PLEAS, PHILADELPHIA COUNTY NOS. 6001, 6003 OF MARCH TERM, 1992 DATED FEBRUARY 21, 1996

BRIEF AND RECORD FOR APPELLANT

* * *

XVII. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO HEARSAY TESTIMONY REGARDING STATEMENTS MADE TO RONALD BROOKS BY THE DECEDENT DESCRIBING A MOTIVE FOR THE SHOOTING.

It is well-settled that when analyzing ineffective assistance of counsel claims, Pennsylvania Courts apply a three-pronged test: 1) whether the issue underlying a charge of ineffective assistance has arguable merit; and 2) whether the course selected by counsel had some reasonable basis designed to effectuate the client's interest; and 3) whether the defendant was actually prejudiced by the ineffectiveness. COMMONWEALTH VS. PIERCE, 515 Pa. 153, 527 A.2d 973 (Pa. 1987); COMMONWEALTH VS. DAVIS, 518 Pa. 77, 541 A.2d 315 (1988). A claim of ineffective assistance of counsel must be based on evidence and not merely unsupported allegation. COMMONWEALTH VS. BULLOCK, 415 A.2d 1240, 272 Pa. Super. 464 (Pa. Super. 1979). Thus, counsel has been held ineffective for failing to object to adverse hearsay testimony. COMMONWEALTH VS. TANN, 500 Pa. 593, 459 A.2d 322 (1983).

In the instant case, the commonwealth was allowed to cross-examine witness Ronald Brooks regarding a statement he allegedly gave to police. In that statement, he supposedly relate [sic] that the decedent told him that Mr. Fletcher has shot [sic] the deceased because he received from Mr. Fletcher a package of drugs but failed to account for the proceeds thereof. (N.T., 1/20/94, pp 21-24) Such testimony was clearly hearsay, but defense counsel did not object thereto.

This Failure was particularly onerous as it purported to supply motive for the shooting. Defense counsel's failure to object was not designed to effectuate his defendan's [sic] best interest, and actually served to his client's detriment.

* * *